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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CASSIUS KIM COLLINS, Defendant and Appellant.	D058666 (Super. Ct. No. MH103512)

APPEAL from a judgment of the Superior Court of San Diego County, Roger W. Krauel, Judge. Affirmed in part; reversed in part; remanded with directions.

Cassius Kim Collins appeals from a judgment involuntarily committing him for an indeterminate term to the custody of the California Department of Mental Health after a jury found him to be a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (the Act). (Welf. & Inst. Code,[1] § 6600 et seq.)

1 Statutory references are to the Welfare and Institutions Code unless otherwise specified.

Collins raises two issues. First, he argues his trial counsel was ineffective by failing to object to certain terms used by the prosecutor and inadmissible hearsay evidence relied on by the prosecution's expert witnesses. Second, Collins attacks the Act on state and federal constitutional grounds, including under the equal protection clause. We reverse the judgment solely as to Collins's equal protection claim and remand the case to the superior court for reconsideration of Collins's equal protection argument in light of *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*). We affirm the judgment in all other respects.

FACTS

Collins stipulated that he had been convicted of a qualifying offense under the Act. The disputed facts at trial were whether Collins has a diagnosed mental disorder that affects his ability to control his emotions and behavior resulting in present dangerousness because it is likely he will engage in sexually violent predatory criminal behavior. Most of Collins's appeal focuses on the information relied on by the prosecution's expert witnesses, which included police reports.

Information Relied on by the Prosecution's Expert Witnesses

1986: Ch. and Co.

In June 1986, Collins, age 29, moved to San Diego. Collins had arranged to live with a family that had two sons, Ch., age 6, and Co., age 4. The boys' mother was in the military, living in Japan. When their father went to Japan for two weeks to visit their mother, Collins cared for the boys. During this time, Collins orally copulated Ch. three times, on three different days. He orally copulated Co. at least one time.

After returning from Japan, the boys' father noticed that during a bath together, the boys had erections. It appeared the boys had engaged in an act of oral copulation. The boys told their father that Collins had orally copulated them when he was away. When questioned by the police, Collins denied that he molested the boys. Later, Collins admitted to the police that he orally copulated both boys. He stated he did not know why he did it, thought it was a dream, and was under a lot of stress while the boys' father was away. Collins was convicted of one count of lewd and lascivious conduct on Ch. (Pen. Code, § 288, subd. (a)), and granted probation. Shortly after, Collins fled.

1996: T.

In February 1996, Collins lived with a woman and her five-year-old son, T., in Florida. The court granted Collins's motion in limine to exclude further facts that described Collins's inappropriate touching of T. At trial, no one testified about Collins touching T.

1996: Lo. and Le.

Later that year, in October, Collins was arrested for molesting 10-year-old Lo. and six-year-old Le. Lo., Le., and their mother moved into Collins's residence after being evicted from their apartment. One night, Collins went into the boys' bedroom and molested them. First, Lo. awoke to find Collins's hand in his pants, fondling his penis. Lo. turned away from Collins, and he stopped. However, Collins then molested Le. by fondling his penis and orally copulating him. Because they were afraid, the boys waited until Collins left for work in the morning to tell their mother.

The boys' mother contacted the police. When confronted by police, Collins denied that he molested Lo. and Le. He said he only went to their bedroom to check on them. Collins agreed to meet with the police at a later date, but instead, fled. Prior to fleeing, Collins requested a pay advance from his employer. According to Collins, he left Florida because he was being harassed and the police did not help him. After leaving Florida, Collins lived in a homeless shelter in Virginia.

After months in the shelter, officials realized he had a warrant. Collins was then extradited to Florida to answer the molestation charges stemming from Lo.'s and Le.'s accusations. In 1998, Collins pled no contest to two counts of misdemeanor battery and one count of false imprisonment. For these offenses, the Florida court imposed local jail time and granted Collins five years' probation.

2006: Arrest for Probation Violation

In 2006, Collins was arrested for a probation violation (absconding) related to the 1986 child molestation case involving Ch. in San Diego. When interviewed in connection with the probation violation, Collins denied that he molested either Ch. or Co. He claimed that the boys' father owed him $10,000 and made up the allegations so that the debt would not have to be repaid. Collins also denied that he molested Lo. and Le. He claimed that the boys' mother was a "crack head" who owed him money and accused him of molestation so that she would not have to pay back her debt.

At the commitment trial, however, Collins admitted that he orally copulated Ch. two or three times. He denied that prior to living with Lo. and Le. in 1996, he moved in with another family in Florida that had a five-year-old boy.

The Prosecution's Expert Witnesses Opine Collins Meets the Commitment Criteria Under the Act

Based partly on the events in 1986, 1996, and 2006 described above, psychologist Clark Clipson believed that Collins met the Act's commitment criteria. He diagnosed Collins with pedophilia, nonexclusive type, because of his history of committing the same acts on prepubescent boys under similar circumstances of having gained the parents' trust to live with or be alone with the boys. Dr. Clipson also determined that Collins met the criteria for alcohol abuse and antisocial personality disorder.

Dr. Clipson used various actuarial tools to determine the chances of Collins reoffending in a sexually violent and predatory manner. Collins scored in the moderate to high range for risk of reoffense. Based on the pedophilia diagnosis, his interview with Collins, the documents reviewed, and Collins's scores on the actuarial tests, Dr. Clipson believed Collins's mental disorder affected his ability to control his behavior and that there was a substantial risk that Collins would reoffend in a sexually violent predatory manner.

Psychologist Craig Teofilo also evaluated Collins and diagnosed him with pedophilia, nonexclusive type, because Collins's conduct in 1986 and 1996 shared many common features. He also diagnosed Collins with alcohol dependence in institutional remission and noted Collins exhibited antisocial personality traits. Dr. Teofilo explained

that pedophilia is a chronic disorder that does not go into remission. The condition can be managed through treatment, but it is not curable. Dr. Teofilo explained that Collins's sexual offenses were the result of his pedophilia, rather than general criminal behavior. Dr. Teofilo believed that Collins's pedophilia impaired his ability to control his emotions and his behavior. Like Dr. Clipson, Dr. Teofilo administered several actuarial tests in which Collins scored in the moderate to high range for risk of sexual reoffense.

In Dr. Teofilo's opinion, Collins presented a substantial and well founded risk of reoffense. In particular, Dr. Teofilo believed Collins would reoffend in a similar manner. Based on the information he reviewed, Dr. Teofilo concluded Collins met the criteria for commitment under the Act.

DISCUSSION

I

COLLINS HAS NOT ESTABLISHED HIS TRIAL COUNSEL WAS INEFFECTIVE

During trial, the prosecutor's expert witnesses testified, as bases for their respective opinions, about Collins's conduct in 1996 in living with T. and molesting Lo. and Le. On appeal, Collins insists this evidence was inadmissible hearsay, but his trial counsel did not object to this evidence. As such, he forfeited this claim on appeal. (See *People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Wheeler* (1992) 4 Cal.4th 284, 300.)

To avoid forfeiture, Collins argues his trial counsel was ineffective for failing to object. Specifically, he contends his trial counsel should have objected when the prosecutor referred to Collins's living situation with T. as an "incident" and included it when discussing the "offenses" collectively. In addition, Collins claims his trial counsel was ineffective by failing to object to the prosecution's expert witnesses' testimony about his acts against Lo. and Le., which were based on police reports. We reject both of these contentions. We cannot determine Collins's trial counsel was ineffective on the record before us.

A. Background

Collins moved in limine to exclude evidence of a 1996 incident that occurred while he lived with a mother and her five-year-old son, T. Allegedly, Collins had touched T.'s genital area while asleep. T. reported the touching to his mother, but after a police investigation, charges were not filed. It was unclear if T. had actually told his mother that Collins had touched him inappropriately.

The court agreed with Collins that any statement that Collins inappropriately touched T. was not admissible as evidence relied on by the expert witnesses, but stated, "[t]he 1996 incident can be referred to and talked about by the experts as to [Collins] seeking out a living situation in which he would be in close proximity to young boys."

At trial, the prosecutor asked Dr. Clipson whether he reviewed "an incident in 1996 where [Collins] was living with another family." Dr. Clipson replied in the affirmative and noted Collins was in a situation where he lived with a five-year-old boy and his mother. Without any objection, the prosecutor then asked Dr. Clipson about any commonalities in the offenses, "the Florida incident with Le. and Lo., the situation he's living with another woman and her child, her son, and the incidences in San Diego." Dr. Clipson then testified about the common features, which included Collins living in the same house with adults with young children, essentially gaining access to the children while gaining the trust of the parents. Dr. Clipson testified how the common features of the incidents from 1986 and 1996 assisted him in diagnosing Collins with pedophilia and in understanding what types of offenses Collins was likely to commit in the future. There was no testimony about Collins inappropriately touching T.

Drs. Clipson and Teofilo also reviewed police reports and testified about Collins's offenses in 1996 against Lo. and Le. Collins's trial counsel did not object, but did cross-examine the experts regarding the reliability of the police reports, arguing molestation allegations are not always true and mistakes are sometimes made in the reporting documents.

At the end of trial, the court instructed the jury in regard to the information relied on by the expert witnesses: "Expert witnesses testified that in reaching their conclusions as expert witnesses they considered information contained in reports and records. You may consider that information only to evaluate the expert's opinion. Do not consider that information as proof that the information contained in the reports or records is true."

B. Collins's Right to Counsel and Proving Ineffective Counsel

The Sixth Amendment only applies to criminal proceedings. (U.S. Const., 6th Amend.) Although an SVP proceeding is civil (*People v. Superior Court* (*Cheek*) (2001) 94 Cal.App.4th 980, 988), the Act provides defendants with certain safeguards, including the right to counsel. (§ 6603, subd. (a).) Thus, unlike criminal proceedings, a defendant's right to counsel is statutory, not constitutional.

In the context of dependency proceedings, courts have interpreted the statutory right to counsel to include the right to seek review of claims of incompetence of counsel under the two-part test found in *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*). (See *In re O.S.* (2002) 102 Cal.App.4th 1402, 1407; cf. *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1662.) Here, both parties contend *Strickland* governs Collins's claims. We agree.

To show that trial counsel's performance was constitutionally defective, an appellant must prove: (1) counsel's performance fell below the standard of reasonableness, and (2) the "deficient performance prejudiced the defense." (*Strickland*, *supra*, 466 U.S. at pp. 687-688.) It is the defendant's burden to prove the inadequacy of trial counsel, and defendant's burden is difficult to satisfy on direct appeal. Competency is presumed unless the record affirmatively excludes a rational basis for trial counsel's choice. (*People v. Ray* (1996) 13 Cal.4th 313, 349 (*Ray*); *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260.) We reverse on the ground of inadequate assistance on appeal

only if the record affirmatively discloses no rational tactical purpose for counsel's act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437 (*Lucas*); see *Ray*, *supra*, at p. 349.)

C. Analysis

Collins's claims of ineffective counsel arise from his trial counsel's failure to object to certain evidence at trial. However, we generally defer to the tactical decisions of trial counsel. Because "the decision whether to object . . . is highly tactical" (*People v. Catlin* (2001) 26 Cal.4th 81, 165), counsel's "failure to object will rarely establish ineffective assistance" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502). (See *People v. Frierson* (1991) 53 Cal.3d 730, 749 ["[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal."]; *People v. Ghent* (1987) 43 Cal.3d 739, 772 ["[A] mere failure to object to evidence or argument seldom establishes counsel's incompetence."].) Therefore, unless the record affirmatively discloses no rational tactical purpose for Collins's trial counsel's failure to object, we cannot conclude the trial counsel was ineffective. (See *Lucas*, *supra*, 12 Cal.4th at pp. 436-437.)

1. *Collins Cannot Show His Trial Counsel Was Ineffective For Failing to Object to the Prosecutor's Use of the Words "Incident" and "Offenses"*

Collins first contends his trial counsel was ineffective for failing to object to the prosecutor's use of the terms "incident" and "offenses" when referring to Collins living with T. in 1996. Collins asserts a living situation cannot be an "incident" or "offense,"

and by using these terms, the prosecutor was suggesting to the jury that "something sexually untoward took place in addition to the living situation." He asserts the prosecution's use of the words "incident" and "offenses" provided the jury with "inadmissible and unreliable hearsay."

Hearsay evidence "is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) The words "incident" and "offenses" do not fit this definition of hearsay. They were not out-of-court statements offered for the truth of the matter stated. Moreover, the prosecutor's questions involving these terms did not elicit any hearsay evidence. Nevertheless, Collins argues his trial counsel should have objected to the prosecution's questions on the grounds of hearsay. We are not persuaded. Because there was no hearsay grounds on which to object, a hearsay objection would have been futile. As such, we conclude Collins's trial counsel was not ineffective for failing to object to the prosecutor's use of the terms "incident" and "offenses" as hearsay. (See *People v. Price* (1991) 1 Cal.4th 324, 387 ["Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile."].)

In addition, even if we were to assume that a proper objection did exist, the record does not provide us with any information from which we could determine whether Collins has met his burden to show ineffective assistance of counsel on this issue. All we know from this record is that Collins's counsel did not object. Perhaps Collins's counsel did not object because he did not want to draw undue attention to Collins's living

situation with T. He might have believed an objection would cause the jury to think there was more to the living situation than what was testified to at trial. Consistent with the court's pretrial ruling, no one testified about the allegations that Collins inappropriately touched T. Thus, Collins's counsel reasonably could have believed it tactically sound to avoid further highlighting Collins's living situation with T. by objecting. In any event, Collins has not shown there was a lack of rational basis for his trial counsel's failure to object. We cannot simply assume ineffective representation without a record that shows trial counsel's reasoning. An appellate court generally cannot fairly evaluate counsel's performance at trial based on a silent record. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 (*Mendoza Tello*).)

2. *Collins Cannot Prove His Counsel Was Ineffective by Failing to Object to the Prosecution's Expert Witnesses' Testimony About the Contents of the Police Reports Regarding the 1996 Offenses Against Lo. and Le.*

Collins next challenge concerns certain police reports relied on by the prosecution's expert witnesses to form their opinions. "Evidence Code section 801[2] limits expert opinion testimony to an opinion that is '[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the

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2 Evidence Code section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on a matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates. . . .' [Citation.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*).)

Thus, expert testimony may be based "on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*Gardeley*, *supra*, 14 Cal.4th at p. 618.) "Of course, any material that forms the basis of an expert's opinion must be reliable." (*Ibid*.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for the expert's opinion testimony." "And because Evidence Code section 802[3] allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*Gardeley*, *supra*, at p. 618.)

A trial court, however, " 'has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.' [Citation.]" (*Gardeley*, *supra*, 14 Cal.4th at p. 619.) "A trial court also has discretion 'to

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3 Evidence Code section 802 provides: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation.]" (*Ibid.*; *People v. Bell* (2007) 40 Cal.4th 582, 608.)

Further, "[b]ecause an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment. [Citations.] Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his [or her] opinion and should not be considered for their truth." (*People v. Montiel* (1993) 5 Cal.4th 877, 919 (*Montiel*); *People v. Catlin*, *supra*, 26 Cal.4th at p. 137.) "Sometimes a limiting instruction may not be enough. In such cases, Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value." (*People v. Bell*, *supra*, 40 Cal.4th at p. 608.)

Here, a limiting instruction was given that informed the jurors that information that is admitted through an expert goes only to the basis of his opinion and should not be considered for its truth as set forth in *Montiel*, *supra*, 5 Cal.4th at page 919. Therefore, to the extent that a hearsay problem arose from the testimony of the prosecution's expert witnesses, it was cured by the giving of the limiting instruction approved in *Montiel*. Collins, however, discounts the limiting instruction and insists the police reports were too unreliable for the experts to rely on in forming their opinions. Specifically, Collins

asserts the police reports do not satisfy the factors of reliability set forth in *People v. Otto* (2001) 26 Cal.4th 200 (*Otto*). We disagree.

Collins's reliance on *Otto, supra*, 26 Cal.4th 200 is misplaced. In *Otto*, our high court considered the issue of whether due process was violated in a proceeding under the Act because the victims' hearsay statements in presentence reports were admitted to show the details of the qualifying offenses. (*Id*. at pp. 206-207.) The court concluded there was no due process violation because, among other reasons, the victims' hearsay statements "possess[ed] sufficient indicia of reliability to satisfy due process" since the defendant had been convicted of the offenses and courts routinely rely on presentence reports to make factual findings in sentencing hearings. (*Id*. at pp. 211-213.) Additionally, the court noted that procedural safeguards further diminished the risk of unreliable hearsay, including the defendant's opportunity to present his own psychological experts and to cross-examine the prosecution witnesses, as well as the trial court's discretion to exclude unreliable hearsay under Evidence Code section 352. (*Otto, supra*, at p. 214.) Thus, *Otto* is distinguishable from the instant matter because it concerned the admission of hearsay evidence to prove a qualifying offense, and not evidence admitted through expert testimony for the nonhearsay purpose of revealing the factual basis for the expert's opinion.

Even if we were to expand the holding in *Otto, supra*, 26 Cal.4th 200, and apply its reliability analysis to an expert's use of hearsay evidence to form his opinion in a proceeding under the Act, Collins's argument still fails. The issue before us is whether Collins's trial counsel was ineffective. To prove his trial counsel was ineffective, Collins

must first show his counsel's performance fell below the standard of reasonableness. (*Strickland*, *supra*, 466 U.S. at pp. 687-688.) On the record before us, he cannot do so.

Collins focuses on a single sentence in the *Otto* decision: "The most critical factor demonstrating the reliability of the victim hearsay statements is that Otto was convicted of the crimes to which statements relate." (*Otto*, *supra*, 26 Cal.4th at p. 211.) Based on this sentence, Collins asserts the police reports are not reliable because the charges based on the police reports were reduced from the original "Capital prosecution" to false imprisonment and battery to which he pled no contest. In other words, he was not "convicted of the crimes to which the statements relate." (*Ibid*.) The holding in *Otto*, however, does not require that a defendant be convicted of the original crime charged based on a police report for the hearsay statements contained in the report to be deemed reliable.

Here, based on the police reports of the 1996 incidents with Lo. and Le., Collins was originally charged with multiple felonies. Apparently, the charging document listed the offenses as "Capital." Collins ultimately entered a plea of no contest to two misdemeanor counts of battery and one for false imprisonment.

However, the fact Collins pled no contest to lesser crimes does not necessarily undermine the reliability of the police reports. We cannot tell, without additional information, why Collins was allowed to plead to lesser crimes. Here, contrary to Collins's assertion, it does not matter that the prosecution failed to explain this reduction at trial. Instead, Collins needs to show us that no rational basis exists for his trial

counsel's choice not to object to the experts' testimony about the police reports. (*Ray*, *supra*, 13 Cal.4th at p. 349.) He has not done so.

"The prosecutor ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451; see *People v. Valli* (2010) 187 Cal.App.4th 786, 801.) The record is silent as to why Collins was permitted to plead to the lesser crimes. Perhaps, as Collins suggests, the allegations in the police report were untrue. But equally plausible, the prosecutor might not have wanted to subject Lo. and Le. to testifying at trial. Also, it is possible Lo. and Le.'s parents did not want to cooperate with the prosecutor's case. Whatever the reason may be, we cannot tell on this record. The police reports, original charging documents, and Collins's plea are not in the record. There is no testimony from anyone familiar with the Florida case explaining the circumstances of Collins's plea. Collins offered no explanation during his commitment trial. There is no indication that Collins challenged the allegations in the police reports in any proceeding in Florida. Simply put, we cannot fairly evaluate counsel's performance at trial based on a silent record. (*Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267.) This is especially true here where Collins's argument depends on events, documents, and facts not sufficiently explained in the record.

Contrary to Collins's assertion, the record appears to support the People's argument that Collins's trial counsel's decision not to object to the testimony about the police reports was a reasonable one. Collins's trial counsel moved to exclude any mention of the police report from the alleged incident with T. If he believed the police

reports of the incidents with Lo. and Le. were similarly unreliable, he could have moved to exclude them as well. Thus, the record leads us to believe that the trial counsel believed the reports were reliable enough not to warrant a pretrial challenge.

Foregoing a pretrial challenge to the police reports, Collins's trial counsel instead vigorously attacked the reliability of the reports during cross-examination of the experts by suggesting molestation allegations are not always true and mistakes can be made in the reporting documents. Also, Collins testified at trial that he did not molest Lo. or Le., but was afraid of being convicted of the original charges and being sentenced to prison for life.

The testimony about the content of the police reports was not used to prove the truth of the matters asserted, but merely as a basis for the experts' opinions. The jury was properly instructed on this point. And the jury was presented with ample evidence to evaluate the reliability of the police reports. Collins's trial counsel could have reasonably decided to forgo an objection to the experts' testimony about the police reports because he did not believe the court was likely to sustain it, and instead, challenge the experts' reliance on those reports through cross-examination and Collins's testimony. Such a decision is not unreasonable. To the contrary, it is a sound, tactical choice.

In short, the record does not affirmatively exclude a rational basis for Collins's trial counsel's choice not to object to the experts' testimony about the content of the police reports. (*Ray*, *supra*, 13 Cal.4th at p. 349.) Accordingly, Collins has not carried his burden of proving his trial counsel was ineffective.

II

EXCEPT FOR HIS EQUAL PROTECTION CLAIM, COLLINS'S CONSTITUTIONAL CHALLENGES TO THE ACT ARE WITHOUT MERIT

Collins contends the Act violates his equal protection, due process, ex post facto, and double jeopardy rights under both the California and federal Constitutions.

In 2010, in *McKee*, *supra*, 47 Cal.4th 1172, our Supreme Court concluded: "[T]he state has not yet carried its burden of demonstrating why SVP's, but not any other ex-felons subject to civil commitment, . . . are subject to indefinite commitment. . . . [W]e remand to the trial court to permit the People the opportunity to justify the differential treatment in accord with established equal protection principles." (*Id*. at p. 1184.)

Collins asserts, and the People agree, that in light of *McKee*, *supra*, 47 Cal.4th 1172, we must vacate the indefinite commitment and remand the matter to the superior court for further proceedings on Collins's equal protection challenge to indeterminate commitments under the Act. We agree.

As Collins concedes, the remainder of his constitutional challenges have been rejected by our Supreme Court. (See *McKee*, *supra*, 47 Cal.4th at pp. 1188-1195.) We must follow *McKee*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we also reject these remaining constitutional challenges for the reasons set forth in *McKee*, *supra*, at pages 1188 to 1195.

DISPOSITION

The judgment is reversed solely as to Collins's equal protection claim. The matter is remanded to the superior court for reconsideration of Collins's equal protection argument in light of *McKee, supra*, 47 Cal.4th 1172, and the final resolution of the proceedings on remand in *McKee* (see *id*. at pp. 1208-1210). In this regard, the superior court shall suspend further proceedings in this case pending finality of the proceedings on remand in *McKee,* including any proceeding in the Superior Court of San Diego County in which *McKee* may be consolidated with related matters, any subsequent appeal, and any proceedings in the California Supreme Court. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

AARON, J.